APPENDIX I.

Opinion Below.

In the Court of Appeal, Fourth Appellate District, Division One, State of California.

Filed: May 22, 1968.

Frank J. Ragen appeals from a judgment of conviction entered after a jury found him guilty of raping a female under the age of eighteen years (Pen. Code, §261[1]), raping a female prevented from resisting by his having administered an intoxicating narcotic or anesthetic substance (Pen. Code, §261[4]), and two counts of sex perversion (Pen. Code, §288a).

As of May 26, 1966, Ragen, a general medical practitioner, was treating sixteen-year-old tonsillitis patient Diane. On that date, Diane appeared at Ragen's office at 5:40 p.m., as he had instructed her. No receptionist was there. No nurse was there. Although not required for treating tonsillitis, Ragen wanted to and recommended he perform a pelvic examination. Ragan injected Pentobarbital, a hypnotic drug, into Diane, and made her take two pills. She became weak and dizzy. Before long he had her take off her underclothing beneath her skirt. At his instruction she climbed onto an examination table, put her heels in stirrups extending out from the end of the table and pulled her buttocks all the way to the end of the table, leaving her extremely exposed. Ragen stood between her legs, jabbing his penis into her vagina. He then sat on a stool between Diane's legs and twice glided his tongue on her vagina. Later, Ragen told Diane he had to spray her throat. After taping her eyes with gause patches, he stood by the side of the table

and put his penis into her mouth, telling her to suck the lollipop.

Although dopey and weak when she got home, Diane telephoned a girl friend. Crying hysterically she explained what Ragen had done. The girl friend's mother called the police. Diane was taken to a Chula Vista hospital for tests. The tests did not confirm her story. Knowing Diane's story and the medical evidence casting doubt on it, the police were not about to arrest Ragen, a respected doctor. They suggested Diane telephone Ragen, accuse him, ask him questions they would prepare and let them record the conversation. Diane called Ragen about noon, May 27, 1966. For eight minutes he denied everything, with an occasional incriminating slip. Finally, he suggested he would call her back about 4:00 p.m. She agreed. At 5:40 p.m., Ragen called Diane. They spoke for fifteen minutes. In substance, Ragen emotionally admitted his crime, putting his life in her hands, asserting he would kill himself unless somehow she could charitably forgive him and keep her mouth shut.

The events described above led to Ragen's conviction for statutory rape, narcotic rape and one count of sex perversion. The other count of sex perversion involved five and one-half months pregnant Ruth. In June 1964, suffering cramps and contractions, Ruth telephoned Ragen, her doctor. He suggested meeting at his office at 10:00 p.m. Not surprisingly, no nurse was there. Ragen had Ruth get onto the examination table and put her feet into stirrups. He gave her an injection, making her dizzy, groggy, light-headed and drowsy. She fell asleep. She woke up finding Ragen standing between her legs, his penis penetrating

her vagina. Later, he tried to force his penis into her mouth.

Attacking the trial court's admission of the tape recording of his telephone conversations with Diane, Ragen makes three unmeritorious contentions:

1) Ragen contends tape recording his telephone conversations with Diane constituted an unreasonable search and seizure. Relying on *Katz v. United States,* 389 U.S. 347 [88 S. Ct. 507], and *Berger v. State of New York,* 388 U.S. 41 [87 S. Ct. 1873], Ragen correctly argues tape recording a telephone conversation is a search within the Fourth Amendment to the United States Constitution. The Fourth Amendment protects against *unreasonable* search and seizure. Neither *Katz* nor *Berger* dictates whether tape recording a telephone conversation is unreasonable where one party to the conversation consents to the recording. In *Hoffa v. United States,* 385 U.S. 293, 302 [87 S. Ct. 408, 413-414], the United States Supreme Court said:

> "Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrong-doer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. Indeed, the Court unanimously rejected that very contention less than four years ago in Lopez v. United States, 373 U.S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462."

Katz v. United States, supra, 389 U.S. 347 [88 S. Ct. 507], and *Berger v. State of New York, supra,* 388 U. S. 41 [87 S. Ct. 1873], to whatever extent they reflect displeasure with trespass and physical in-

vasion theories applied in *Olmstead v. United States,* 277 U.S. 438 [48 S. Ct. 564], and even *Lopez v. United States,* 373 U.S. 427 [83 S. Ct. 1381], do not diminish in the slightest the discussion of one party consent in *Hoffa v. United States, supra,* 385 U.S. 293, 302 [87 S. Ct. 408, 413-4141, and *Lopez v. United States, supra,* 373 U.S. 427 [83 S. Ct. 1381]. (Cf. *United States v. White,*[1] ..... F. 2d ..... [7 Cir. 1968] [U.S. Law Week April 9, 1968, Vol. 36, #39]. Ragen, in other words, took the chance Diane might publicize their conversation. The tape recording, with assured accuracy, merely told what Diane could say on the witness stand.

2) Ragen contends his telephone statements to Diane were involuntary because Diane's questions and accusations deceived him and incited fear and panic in him. As Ragen argues, the Fourteenth Amendment to the United States Constitution forbids using a mentally coerced confession in a state criminal trial (*Leyra v. Denno,* 347 U.S. 556 [74 S. Ct. 716]. *Rogers v. Richmond,* 365 U.S. 534 [81 S. Ct. 735]). Ragen cites as deception Diane's not telling him the police were recording the conversations. This deception he equates with mental coercion. Deception, however, does not render statements inadmissible if it is not of a type reasonably likely to procure an untrue statement (*People v. Arguello,* 65 Cal. 2d 768, 775; *People v. Hays,* 250 Cal. App. 2d 96, 98) and the police conduct is not such as (1) to overbear the will to resist, and (2) to bring about confessions not freely self-determined (*Rogers v. Richmond, supra,* 365 U.S. 534, 544 [81 S. Ct. 735, 741]). We are convinced

[1]Decision not final.

the deception practiced here, Diane's not telling Ragen about the police recording the planned questioning, was not reasonably likely to procure an untrue statement. Neither was the police conduct in having Diana call and ask the prepared questions used here, hiding the police involvement, such as to overhear Ragen's will to resist or to bring about confessions not freely self-determined. The situation, being caught and accused by his victim, not deception, caused Ragen to incriminate himself. In terms of self-determination, Ragen did not have to call Diane and could have hung up anytime, taking the consequences of his own sordid criminality. Indeed, he himself placed the second and overwhelmingly incriminating telephone call. Ragen's statements were voluntary.

3) Ragen contends his telephone statements to Diane were inadmissible because before taping them the police did not warn him of his constitutional rights as stated in *Miranda v. Arizona,* 384 U.S. 436 [86 S. Ct. 1602]. Conceding he was not in custody or under arrest is not an indispensable requirement before a *Miranda* warning is required. In *People v. Arnold,* 66 Cal. 2d 438, 448, however, the California Supreme Court adopted the requirement and definition of custody found in *Miranda v. Arizona, supra,* 384 U.S. 436, 444 [86 S. Ct. 1602, 1612]:

> "'By *custodial* interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' (Italics added.)"

Ragen was not deprived of his freedom of action in any significant way. He could have hung up. He

did not have to call Diane. His statements, therefore, were admissible, considering the totality of circumstances, although he had not been warned of the *Miranda* rights. See *People v. Ing,* 65 Cal. 2d 603, 612-613.

Ragen contends the trial court improperly admitted evidence of his sexual misbehavior with patients other than Diane and Ruth. These vile events occurred as follows:

1) In March 1957, Ragen treated eight months pregnant Mrs. Barnley. A nurse helped Mrs. Barnley onto an examination table. Mrs. Barnley placed her legs in stirrups with her buttucks on the end of the table. In the absence of the nurse, Ragen examined Mrs. Barnley, rubbed his penis up and down in her vaginal area, and, then very forcefully inserted his penis into her vagina.

2) Also in March 1957, Ragen mis-treated 15-year-old, six months pregnant Mrs. Fisher as he had mis-treated Mrs. Barnley, except he never accomplished penetration.

3) Also in March 1957, Ragen mis-treated six to eight months pregnant Mrs. Jenkins as he had Mrs. Fisher.

4) In August 1959, Ragen mis-treated 16-year-old Mrs. Smith for an infection of the cervix. In the absence of a nurse, he had Mrs. Smith get onto the examination table with the stirrups. Ragen gave her an injection, making her relaxed, light-headed and happy. He inserted his penis into her vagina. After blocking her vision with a cloth, he put his penis up to her mouth.

The evidence of Ragen's earlier sexual behavior with patients was admissible. In view of the striking similarities between the offenses charged and the earlier behavior, the evidence proved a common scheme or plan to molest patients, in the absence of a nurse, by getting them onto the examination table with their feet in stirrups and buttocks on the end of the table, rubbing or inserting his penis in their vaginal areas, and, at times, administering intoxicating narcotic or anethestic substance followed by attempting to penetrate or penetrating their mouths with his penis (*People v. Ing, supra,* 65 Cal. 2d 603, 612; *People v. Cramer,* 67 A.C. 121, 125-126). In *People v. Cramer, supra,* 67 A.C. 121, 125-126, the California Supreme Court said:

> "It is settled that evidence of other crimes is ordinarily admissible where it tends to show presence of a common design, plan, or *modus operandi* and we recently recognized in *Kelley, supra,* [*People v. Kelley,* 66 Cal. 2d 232] that this rule applies to sex offenses committed with persons other than the prosecuting witness. We there pointed out that, although charges of sex offenses are often unreliable and particularly difficult to disprove, such evidence is admissible as showing a common scheme or plan where the offenses are not too remote, are similar to the offense charged, and are committed with persons similar to the prosecuting witness. (Citation.) Several decisions have held that the test of admissibility of evidence of another offense offered to prove common design, plan, or *modus operandi* is whether there is some clear connection between that offense and

the one charged so that it may be logically inferred that if defendant is guilty of one he must be guilty of the other. Or as the matter is sometimes stated, the other offenses offered to prove pattern, scheme, or plan are sufficiently similar and possess a sufficiently high degree of common features with the act charged where they warrant the inference that if the defendant committed the other acts he committed the act charged. (Citations.) Other cases have spoken of a 'peculiar or characteristic behavior pattern' (Citations.), 'bizarre details' (Citation.) and 'striking similarities' (Citations.)"

Applying these principles, we hold the trial court properly (1) admitted the evidence of Ragan's earlier sexual conduct with patients, and (2) limited the use of this evidence by instructing as follows:

"Now, let's go back to some of the evidence again. With respect to that evidence offered for the purpose of showing that on occasions other than those mentioned in the indictment, the defendant committed acts upon the bodies of Claudia Barnley, Nancy Jane Fisher, Margaret Jenkins and Lucretia Owings Smith similar to those charged against him in this case, you are not permitted to consider such evidence for the purpose of finding against the defendant district offenses or continued criminality, but you may consider it as tending to show, if you decide that it does tend to show, the disposition of the defendant toward Diane Grace Santa Maria and Ruth Casillas, and an inclination on his part to indulge in the method of sexual gratification involved in the crimes of

which he is charged, and, hence, as having some bearing on the question whether or not the defendant committed the specific offenses of which he is accused in this case. As to such limited purpose for which such evidence may be considered, you will weigh it as you do all of the other evidence in the case."

Ragen contends the trial court's conduct of the trial, including a large number of its rulings, many of which he claims were erroneous, cumulatively prejudiced him. He attacks the following evidentiary rulings:

1) During *voir dire* examination of an investigating policeman to determine the admissibility of the taped telephone conversations, the trial court refused to allow Ragen to inquire whether the police kept him under surveillance after the conversations were taped. Contrary to Ragen's argument, evidence showing surveillance after he made his incriminating statements is irrelevant to the issue whether the police should have warned him of his *Miranda* rights before the conversations. In short, the evidence would not tend to prove earlier custody.

2) On the ground of hearsay, Ragen contends the trial court improperly allowed Diane's father and girl friend to testify what Diane said when she complained on the night Ragen sexually molested her. The trial court properly permitted Diane's father and her girl friend to state what Diane said about the nature of the offense and the identity of the offender, and no more *(People v. Burton,* 55 Cal. 2d 328, 351). The trial court also allowed the jury to hear a tape recording of Diane's complaint to the police. To impeach Diane, Ragen introduced evidence of inconsistencies be-

tween her trial testimony and her taped complaint. He requested the court play most of the tape for the jury. To add needed context, the trial court properly played more of the tape than Ragen wanted (*People v. Watson*, 46 Cal. 2d 818, 827). The trial court, furthermore, instructed the jury to consider the tape solely for impeachment.

3) The trial court refused to allow individual physicians to testify why they excluded nurses during pelvic examinations. Their individual reasons were irrelevant. The trial court properly allowed evidence of a partial community practice to exclude nurses during pelvic examinations.

4) After Ragen introduced Ruth's ex-husband's testimony her reputation for truth and veracity is bad, the trial court permitted the district attorney to ask the ex-husband if Ruth had filed a complaint against him for failure to support their minor child. He answered yes. Because of the exceptional circumstance of the bias toward one of two star prosecuting witnesses, the trial court properly allowed the question (*People v. Vanderburg*, 184 Cal. App. 2d 33).

Continuing his review of the trial court's conduct, attempting to grasp something to compound into prejudice, Ragen contends the instructions to the jury were not perfect:

1) Without evidentiary support, the trial court instructed, as applied, the jury might consider the fact, if it be a fact, that among people knowing Ruth, her truth and veracity had not been discussed. This minute surplusage could not have contributed to prejudice.

2) After giving the usual sex prosecution cautionary instruction regarding the difficulty of defending

against charges easily made, the trial court told the jury, in addition, not to be deterred, however, if convinced beyond a reasonable doubt, from returning a guilty verdict. Ragen's reliance on *People v. Lyons*, 47 Cal. 2d 311, is misplaced. In *Lyons*, the trial court hand-wrote this addition to the printed instructions the jury took with them into the jury room. As *read* here, the addition was proper (*People v Searborough*, 171 Cal. App. 2d 186).

3) The trial court did not instruct the jury might consider Ragen's admissions only if found voluntary. Ragen states he objected to the admission into evidence of his admissions on the ground they were not voluntarily made. The trial court ruled otherwise. Ragen did not put evidence of involuntariness before the jury. The issue, therefore, was properly kept from the jury (*People v. Eli*, 66 Cal. 2d 63, 76).

4) The trial court instructed where a case rests entirely or substantially on circumstantial evidence, each fact compounded into a set of circumstances must be proved beyond a reasonable doubt. Ragen asserts this instruction leaves a jury wondering whether circumstantial evidence must be proved beyond a reasonable doubt if the case does not rest entirely or substantially on circumstantial evidence. The general instruction on reasonable doubt, and all the instructions together here, however, made it clear to the jury the evidence of guilt must be beyond a reasonable doubt.

5) Contrary to Ragen's argument, *People v. Lisenba*, 14 Cal. 2d 403, 431, and *People v. Albertson*, 23 Cal. 2d 550, 579, do not require the sex prosecution other offense instruction to state the evidence of other offenses must be "positive and substantial".

6) Ragen argues the trial court should have defined the word "impeachment" for the jury. This was unnecessary (*People v. Shannon*, 147 Cal. App. 2d 300, 305). The trial court, furthermore, defined impeachment evidence for the jury: "It is evidence which you consider for the purpose of measuring, or testing, or weighing the credibility of a witness. . . ."

Ragen unmeritoriously cites as misconduct the following statements by the trial court while instructing the jury:

> "Parenthetically, sometimes, I think I'm going to organize the instructions under a perfectly marvelous, understandable order so that they flow like the waters of the River Poe—which is in flood again, I understand—but today I guess isn't one of them."

This statement does not support Ragen's speculation the court did not think the instructions were worth the trouble to organize.

> "Now, this is an instruction which, no less than any of the others, you must take account of. But I'm going to read it rather hurriedly because there is one phrase in there which for 22 years has driven me out of my mind as constituting an insult to jurors of decent intelligence and with a sincere approach to their responsibility. I think you will recognize it when I get to it.
>
> "You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the declarations of a lesser number of witnesses, or other evidence or a presumption which does not appeal to your mind with more convinc-

> ing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses simply from caprice or prejudice, or, certainly, from any desire to favor one side as against the other. The rule does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses but in the relative convincing force of the evidence. That's a dandy."

This instruction does not support Ragen's statement the trial court disparaged the importance of instructions. Neither does the quoted language divert attention away from its message, as Ragen asserts.

> "Now, I think I'll read down through these instructions, which define the offenses, and then come back to some other evidentiary matters just to break up the tedium."

This statement, Ragen speculates, means that which went before was unimportant and boring. This simply is unwarranted speculation.

Ragen contends the trial court treated the entire trial with reprehensible levity and prosecution bias. He supplies a long list of allegedly objectionable leading questions asked Diane and Ruth. He does not supply their contexts, the previous answers upon which most of them are based. He parades before us a barrage of reporter's transcript references intending to show trial court bias in ruling on objections to leading questions, questions asked and answered, and, in general, trial court attitude. There is no substance whatsoever

in this treatment, taken mostly out of context from the record. It does not add up to prosecution bias.

Regarding levity, Ragen contends the trial court's remarks worked to "dull the edge of advocacy, distract concentration on the business in hand, and dilute the seriousness and solemnity in and with which any important trial should be conducted." We believe all trials deserve the attributes Ragen erroneously complains his trial lacked.

During his first instruction to the jury not to discuss the case before it was submitted to them, the trial court remarked:

> "Well, the reason you are not to discuss the case, or the witnesses, or the testimony, or the exhibits, or the neckties of the lawyers, or the haircut of the judge, is this: We want taken into the jury room for deliberation, after all of the evidence is in, after all of the instructions have been given, twelve independent views of the evidence."

Toward the end of the case the trial court told the jury:

> "I have told counsel that because of the length of the matter I would give them one day free to prepare for argument and discussion. If things go forward in that fashion without some unexpected jolt, we might then finish today with the testimony, take Tuesday away from the case, Wednesday resume for argument and instructions. I would not send you out at the close of a full day of argument and instructions. You will be ready to climb the walls after you have sat all day listening to me and to the lawyers. So, it's

possible that you may begin your responsibility in the case Thursday morning."

After both sides rested the court told the jury:

"Well, I won't ask counsel to jump up and start discussing the case with you this afternoon.

"I think if we give them tomorrow to work on it, they'll be able to boil it down a little bit, and we won't have to listen to so much. I shouldn't really joke about it, I suppose, because actually I'm sure that after a long trial as this one has been, you will find both counsels' remarks very helpful to you. And the more study they can put in on their review, the more help we'll all get."

These examples typify Ragen's citations of alleged trial court levity. In context, without Ragen's briefed exaggerations, the citations do not prove jocular misconduct. This was a long trial seriously conducted with dignity. Defense counsel, district attorney and court occasionally spliced flecks of humor into the trial, not detracting, however, from its serious purpose.

Judgment affirmed.

Gerald Brown, *P. J.*

I Concur:

Coughlin, *J.*

Whelan, *J.*, deeming himself disqualified, did not participate in this case.

APPENDIX II.

Proceedings Relating to Raising the Federal Questions in the Trial Court.

"[THE COURT:] I think the record might reflect that court and counsel are going to listen to a tape recording, which will become a People's exhibit for identification, principally, I guess, to verify the accuracy of a written transcription of the tape which I understand is also here.

Do you wish to add anything?

MR. ENRIGHT: [Petitioner's counsel] No, I think that's accurate. There is a transcription in the Grand Jury transcript, but since I think the way to compare the tape with the transcript would be to use that transcript which is proposed to be shown to the jurors, if the Court overrules my objection.

THE COURT: Yes. The record might also show here, I believe, that Court and counsel in an informal session have arrived at this decision: The Court, voluntarily, and at least one of counsel by necessity, that assuming the admissibility of the tape and the transcript, the transcript will be made available in copy form to the jurors during the playing of the tape. But the transcript will not be sent into the jury room with them.

MR. ENRIGHT: And I would appreciate if the Court overrules my objection, that at the conclusion of the playing of the tape that the transcripts be picked up. In other words—

THE COURT: Yes, understood." [Rep. Tr. (I), p. 215, line 3, to p. 216, line 1.]

* * *

"MR. WADDELL: [Prosecution Counsel] . . .

"The evidence is then going to indicate that at the police department's direction, the law enforcement's direction, Diane Grace Santa Maria was directed to call Dr. Ragen on the telephone the next day. She was directed to ask certain questions and the telephone conversation between Dr. Ragen on the next day, May the 27th, 1966, and the conversation with Diane Grace Santa Maria was then and there recorded by the police department and will be evidence in this case.

The tape recording will disclose, in essence—

MR. ENRIGHT: Now, at this juncture, your Honor, I would like to—there's no question of it—I would like to preserve what I felt was our discussion prior to this time in connection with the evidence about to be mentioned.

THE COURT: Your position may be retained without any prejudice from failure to renew it and may be considered a continuing objection throughout the case.

Go ahead—

MR. ENRIGHT: Thank you.

THE COURT:—Mr. Waddell." [Rep. Tr. (I), p. 227, line 15; p. 227, line 24, to p. 228, line 17.]

* * *

"MR. WADDELL: Of course, now I'm awaiting arrival of the tape itself, your Honor, which I'm going to have as People's next in order. Mr. Woods just informed me it was locked in his desk so he's on his way up to get it, your Honor.

THE COURT: All right, it will become People's 5 for identification, a tape.

MR. WADDELL: This tape, your Honor, purports to be conversations related to in the witness' testimony as to having occurred between her and Dr. Ragen on May the 27th.

Your Honor, while we're waiting for Mr. Woods to bring the tape in, I would ask that Sergeant Gardner from the Chula Vista Police Department set it up so we can get ready to play it when the time comes and perhaps in an effort to save time unless you want to follow it.

THE COURT: Let's mark it, offer it, and then I'll take the discussion of counsel.

(Mr. Woods entered courtroom.)

MR. WADDELL: All right. People ask this tape box and its contents, one tape, be marked People's next in order as 5, your Honor, is that right?

THE COURT: Yes.

(The box and tape were marked People's Exhibit Number 5, for identification.)"

"MR. WADDELL: All right. That's all the foundational questions I have. People will offer 5 for purposes of hearing.

THE COURT: Anything on foundation?

MR. ENRIGHT: Yes, if I could.

VOIR DIRE EXAMINATION OF DIANE GRACE SANTA MARIA: BY MR. ENRIGHT:" [Rep. Tr. (II), p. 331, line 15, to p. 332, line 13; p. 332, line 25, to p. 333, line 6.]

* * * * *

"THE COURT: I assume from the state of the record, prior to the noon recess, Mr. Enright, that

you have no further evidence to present on the foundational problem with respect to People's 5 for identification?

MR. ENRIGHT: None other at this time, your Honor. The only other thing I could think of that I would appreciate if the Court could reserve for the point that we have discussed, by way of the voice print sample. Counsel has suggested that that be done after the testimony of Miss Santa Maria and, of course—

THE COURT: Yes. Any admissible evidence relating to the validity, mechanical or otherwise, of People's 5 can be taken when it's available.

I would say in connection with the argument you propose to make, Mr. Enright, for the record, that in addition to such arguments as you may now wish to present in somewhat summary form, that Court and counsel have to some extent, debated this issue informally in chambers. And the record may further reflect that the jury is still, of course, absent from the courtroom. All right.

MR. ENRIGHT: The points that I would raise for the Court's consideration in connection with the admissibility of the tape are really four distinct positions. . . ."

". . . And, in effect, when Dr. Ragen was talking with Diane Santa Maria, he was talking directly with an agent of the District Attorney's office since she was proceeding at his request, at his suggestion, and following a specific pattern of questioning that he had outlined. So, I think that, in effect, Dr. Ragen was talking directly to the District Attorney when the inquiry had certainly focused upon him."

"The same set of facts, I think are equally appropriate to the second point, which would be the application of the Dorado, Escobedo and Miranda rule in that a warning should have been given to Dr. Ragen. I think the same factual situation applies, and I know that the Court is concerned with the ruling or the holding in People vs. Ballard, which is 64 A.C. at page 164, as I recall, decided in March of this year.

"THE COURT: It's a little earlier than that in the volume I believe.

MR. ENRIGHT: I had it as March 4.

THE COURT: Oh, go ahead.

MR. ENRIGHT: It would seem that that case held that in the absence of custody, the accusatory stage could not have been—could not have matured. And, therefore, they held the Dorado and Escobedo doctrine wasn't applicable.

I would like to cite to the Court that since that case People vs. Ing, which seems to be closer to our factual situation than Ballard, was decided at 242 A.C.A. at page 261. That case relied in the taking of a tape on the authority of Ballard. That case now has been petitioned to the Supreme Court for hearing, and the Supreme Court has granted a hearing. As yet, we do not know on what basis, but I'm satisfied from a reading of the case that Ing was decided solely and squarely on the Ballard principle. And the factual situation in Ing is closer to ours than Ballard, and since a rehearing has been granted by the same court it may be, as I said, that the law is in a state of flux in that regard.

I would suggest to the Court that our case is different from Ballard, and I would cite to the Court as

authority for that, Massiah, which was discussed in Ballard where custody was not a requisite, when they held this, that secret interrogation of the defendant should not be admitted in evidence. I would also cite to the Court the discussion held in People vs. Stewart, 62 Cal. 2d 571, wherein the Court suggests that in making a decision on the admissibility, you must look to the entire set of circumstances surrounding the interrogation.

But, more specifically, People vs. Jones, 47 Cal. Reporter at Page 40. In that case, the Court may recall, a juvenile was turned in by his mother in connection with marijuana that was found in his room. He made a statement to the police that the defendant had given it to him. He was then instructed by the police to call the defendant and inquire of him certain statements which led to what was purported to be an admission or confession, which was introduced against him. In that case, the defendant conceded that he was not in custody at the time of the interrogation, and the People said that that was enough to prevent the application of the Dorado case. The Court held, 'however, as People vs. Stewart indicates, the accusatory process may be undertaken either before or after an arrest. We must look to the whole situation.'

In that case, after considerable discussion, the Court held—which I think delineates our case from theirs—'understandably the police didn't choose to take the defendant into custody solely on the basis of the juvenile's statement.'

Here we have much more than that. We have the charge made, a tape recording made of the victim's statement. We have corroboration, to some extent, of

her story by the hospital examination, and we have the District Attorney's testimony this morning that at that time, before the tapes were made, he had in good faith reasonable cause to believe that a complaint could issue based upon her testimony and her statement.

And, secondly, in the Jones case they delineated it because they said no process of interrogation designed to elicit incriminating statements had begun. This was a voluntary series of statements made to me and during a conversation with a juvenile.

Here we don't have that. Here we have a prepared, specific list of questions in areas that could be explored and should be explored and were, in fact, the only things explored during the course of the conversation.

So, my position is this, based upon Massiah, that there is an artificial distinction to require physical custody by the fact a District Attorney can gather his evidence and then by the simple process of delaying the arrest—delaying the arrest call forth the incriminatory statements without any warning under Escobedo and Dorado and thwart the purposes of that law. Certainly, I think if a defendant is not aware of the charge, he should be warned. Here there is no indication, whatsoever, that this man was aware of the changes that were pending at the time. The police were aware of them, and he certainly would be much more entitled and in need of the warning that seems to be required under Escobedo and Dorado, so I would ask the Court to consider the Massiah case as authority for the proposition that this tape should be excluded from evidence because it did not comply with the requisite of Escobedo and Dorado, and based upon delineations we don't find in the Jones case.

I think that, essentially, is my position relative to the warning that should have been given. Those are the two major points that I would raise: That the custody requirement is an artificial distinction, which I think may well be the reason that the Supreme Court has now granted a hearing in the Ing case. In the Ing case, as I recall, an actual warrant of arrest was in the hands of the officers when they taped the recording made by the alleged victim, when she called the doctor. And I think that the Court will now, possibly, further refine the rule but certainly here we have probable cause existing in the mind of the Deputy who, ultimately, handled the case and was in charge of it, at that time.

So, that's our position the tape, your Honor, with those cases. . . ."

"We're concerned, also, the third point, the authenticity of the tape on which I would like the Court to reserve a ruling. I was concerned, also, whether the recording itself, by the fact of recording, whether or not that conformed with all the requirements of Federal and State law, but all the cases I have been able to find on it would seem that it does—at least at this time—and I would cite to the Court in that regard People vs. Fontaine, 237 Cal. App. 2d at page 320 . . ."

"That, essentially, is the defendant's position relative to the tape, your Honor." [Rep. Tr. (II), p. 391, line 5, to p. 398, line 25.]

* * * * *

"(The following proceedings were had in open court in the presence and hearing of the jury.)

THE COURT: I would only say to you, ladies and gentlemen, that sometime during the course of this trial I'm going to try to do something nice for you. Now, then you have a motion that has either been made and not ruled on or not made.

MR. WADDELL: People would move to admit People's 5 for identification in evidence, your Honor, for the purpose of playing that particular exhibit at this time.

THE COURT: The usual comment for the record that defense counsel's position on the matter is clear and continuing.

MR. ENRIGHT: Thank you.

THE COURT: People's Exhibit 5 will be received.

(The tape recording previously marked People's Exhibit Number 5, for identification, was received in evidence.)"

[Rep. Tr. (II), p. 404, lines 6-23.]